No. 87-840

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CUMBERLAND FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Takings Clause of the Fifth Amendment requires the United States Army Corps of Engineers to allow petitioner, which has filled wetlands without a permit in violation of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a), 1344, to maintain the wetlands in their illegally filled condition and to file an after-the-fact application for a permit.

1. a. In June 1985, the United States brought this suit in the United States District Court for the District of Massachusetts against petitioner to enforce the Clean Water Act's prohibition on the unauthorized discharge of dredged or fill material into wetlands. Section 301(a) of the Clean Water Act bars the discharge of dredged or fill material into the waters of the United States, including wetlands, absent a permit issued by the Army Corps of Engineers pursuant to Section 404 of the Act (see 33 U.S.C. 1311(a), 1344). See generally *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The complaint concerned extensive portions of wetlands

located in the Great Cedar Swamp in southeastern Massachusetts that petitioner had filled since July 1977. Only petitioner's post-July 1977 filling activities were at issue because the wetlands were not covered by Corps regulations until that date. Pet. App. 1a-13a.

Following a trial on liability, the district court ruled (Pet. App. 13a-27a) that since July 1977 petitioner had violated the Clean Water Act by filling wetlands without first obtaining a Section 404 permit. The court rejected (Pet. App. 14a-20a) petitioner's contention that its activities fell within the scope of a limited exemption available under the statute for certain types of farming activities. The court also rejected (*id.* at 21a-27a) petitioner's assertion that its activities were authorized by either of two "nationwide permits" issued by the Corps pursuant to its rulemaking authority under the Clean Water Act.

Following a second trial on remedy, the district court issued (Pet. App. 27a-34a) a mandatory injunction requiring petitioner to implement a plan developed by the Corps for the purpose of restoring the Great Cedar Swamp to its condition as of July 1, 1977. The court, however, modified (*id.* at 29a-34a) the Corps' plan in several respects to avoid, for example, any damage to pre-existing cranberry bogs nearby and also to reduce possible harm to petitioner's existing fields. Finally, the court fined (*id.* at 34a-38a) petitioner pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, based on petitioner's intentional and repeated violations of orders issued by the Corps beginning on December 28, 1984. The court concluded (Pet. App. 35a), however, that petitioner should not be fined for its illegal activities before that date.

b. The court of appeals affirmed (Pet. App. 39a-67a), upholding both the district court's liability determination and its remedy order. The court rejected (*id.* at 58a-64a) petitioner's contentions that the district court's restoration order is contrary to "principles of equity," inconsistent

with the Corps' procedural regulations and the doctrine of primary jurisdiction, and not authorized by the Clean Water Act. In upholding (*id.* at 64a-67a) the substance of the restoration order, the court of appeals concluded (*id.* at 65a) that "[t]he district court [had] carefully considered the possible detrimental impact of the proposed order, but found that the beneficial aspects of the restoration order outweighed the possible detrimental aspects." The court specifically found (*id.* at 66a-67a) that the district court had adequately protected nearby cranberry bogs and homes and also had been careful to protect petitioner's pre-existing farm fields.

2. The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. The issues raised in the petition for a writ of certiorari, moreover, do not appear to have been raised, and were not decided, in either the district court or the court of appeals. Accordingly, further review is not warranted.

Petitioner claims (Pet. 7-9) that the restoration order violates the Takings Clause's prohibition on governmental takings of private property without just compensation. Petitioner, however, does not appear to have raised the taking issue in either the district court or the court of appeals and neither court addressed that constitutional claim. Hence, the taking issue is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, petitioner's taking claim lacks merit for two reasons. First, petitioner plainly possesses no constitutionally protected property right to maintain property in a condition that resulted from petitioner's illegal activity. Both courts held (Pet. App. 14a-27a; *id.* at 47a-58a) that

petitioner illegally filled wetlands on its property—petitioner does not dispute that ruling here—and, as the court of appeals held (*id.* at 58a-67a), the district court did not abuse its discretion in determining that restoration was required to redress the violation.

Second, any takings claim petitioner may have will be ripe only after petitioner applies for a Section 404 permit to fill the area and then only if the permit is denied. Petitioner's sole recourse in that event will, moreover, be to bring suit in the United States Claims Court for damages pursuant to the Tucker Act, 28 U.S.C. 1491. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 128. In no event, therefore, may petitioner raise such a constitutional claim in the current proceeding.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

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* There is no merit to petitioner's suggestion (Pet. 7) that a different result should obtain in this case because the cost of complying with a restoration order in other cases might bankrupt the landowner. Even if the threat of bankruptcy might somehow excuse compliance with a remedy necessary to redress illegal conduct, the possibility that *other* landowners in *other* circumstances might suffer such harm presents no ground for excusing petitioner in this case. Petitioner did not contend in the lower courts that bankruptcy would result from compliance with the restoration order and, accordingly, there is no evidence in the record that petitioner would suffer such adverse economic consequences. Equally unavailing is petitioner's claim (*id.* at 8) that the Tucker Act does not apply "when the action that causes the 'taking' comes about as a result of an order of a district court." A judicial construction of the requirements of a federal statute does not insulate the statute from possible claims that its application is somehow unconstitutional in a particular case. Of course, in this case, there is in any event no basis on the merits for any such constitutional challenge.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60243